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No. 95-724

In The

Supreme Court of the United States

October Term, 1995

SERVICE EMPLOYEES INTERNATIONAL, LOCAL 102, et al.,

Petitioners,

v.

COUNTY OF SAN DIEGO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit correctly determined that the salary basis test of the Fair Labor Standards Act should not be applied to public sector employees, when application of that test is contrary to clear congressional intent.

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Respondent County of San Diego ("County") respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 60 F.3d 1346 (1995).

JURISDICTION

A question exists as to this Court's jurisdiction. "The time to file a petition for writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed . . . " unless a timely petition for rehearing is filed. Sup. Ct. R. 13.3. In such a case, the time to file a petition for writ of certiorari runs from the date of denial of the petition for rehearing, or if that petition is granted, from the subsequent entry of judgment. *Id.*

In this case, petitioners sought rehearing on two separate occasions. The first petition for rehearing related to the precise question presented in this petition for writ of certiorari, and was denied on July 19, 1995. The second petition for rehearing related to an issue not the subject of this petition for writ of certiorari, and was denied on August 7, 1995.

The clear import of Sup. Ct. R. 13.3 is that the judgment or order for which review is sought triggers the time period for filing the petition for writ of certiorari. Thus, the petition for writ of certiorari, which was filed more than ninety days after the denial of the first petition for rehearing, would appear to be untimely.

STATEMENT OF THE CASE[1]

Under the Fair Labor Standards Act ("FLSA"), employers are required to pay overtime compensation to employees who work more than forty hours in a work week at the rate of not less than time and one-half. 29 U.S.C. § 207(a)(1). However, employees who work in a "bona fide executive, administrative, or professional capacity" are exempt from this overtime requirement. 29 U.S.C. § 213(a)(1). The Department of Labor ("Department") is delegated the authority to issue regulations which "define[] and delimit[] from time to time" the scope of these exemptions. *Id.*

Under regulations promulgated by the Department, an employee must meet a two-part test in order to qualify for an exemption from overtime. The employee must meet both a "salary basis" as well as a "duties" test. *Barner v. City of Oakland*, 17 F.3d 1256, 1259-60 (9th Cir. 1994). Only the salary basis test applies to this case.[2]

The petitioners in this case are employees of the County who assert that they have been treated as exempt

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[1] Pursuant to Sup. Ct. R. 15.2, the County points out a perceived misstatement in the Petition, to wit, the fact that jurisdiction pursuant to 28 U.S.C. § 1343 was never pled in the district court. *See* Excerpt of Record filed in the Ninth Circuit in this case (Fifth Amended Complaint), p. 360.

[2] The duties tests for executive, administrative, and professional employees are set forth at 29 C.F.R. §§ 541.101, 541.201, and 541.301, respectively.

employees under the FLSA. They allege that the County has violated the FLSA's salary basis test, which requires that the employee be paid on a salary basis, that is, receive a predetermined amount constituting all or part of the employee's compensation, which is not subject to reduction because of variations in the quality or quantity of the work performed. 29 C.F.R. § 541.118(a). As a result, petitioners claim they are not truly exempt from the FLSA's overtime provisions, and should be paid time and one-half for excess hours worked.[3]

As petitioners note, the Department promulgated regulations in 1940 which established the salary basis test. Petition at 4. At that time, the FLSA did not apply to public sector employees; Congress did not extend FLSA coverage to public sector employees until 1974, and it was not until 1985 that the FLSA finally was applied to the public sector.[4] On November 19, 1985, the Department

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[3] Some of the petitioners are not subject to the salary basis test. For example, physicians and lawyers are not subject to the salary basis test. 29 C.F.R. § 541.314(a). However, some of the petitioners are lawyers and some of the petitioners are physicians. *See, e.g.*, Excerpt of Record filed in the Ninth Circuit in this case (Fifth Amended Complaint), p. 372 (Deputy Medical Examiners); p. 373 (Deputy Public Defenders); p. 380 (physician).

[4] In 1976, this Court ruled that the FLSA's provisions could not be applied to state and local governments which engaged in traditional governmental activities. *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976). However, in 1985, this Court reversed *National League of Cities*, and permitted the application

announced that it would be undertaking a revision of the FLSA regulations, including whether the salary basis test should be increased or eliminated. 50 Fed.Reg. 47,696 (1985). Nothing happened for over a year. Then on January 16, 1987, the Department again announced that it expected to conduct rulemaking on the FLSA regulations during that year. 52 Fed.Reg. 2,019 (1987). Such comprehensive rulemaking never occurred in 1987, or in any year since.

Since 1987, the Department has only taken limited action with respect to the salary basis test. On January 9, 1987, "[t]he Department initially attempted to address the special circumstances of the public sector" with the adoption of a non-enforcement policy which permitted employers to dock pay for absences of less than one day. 57 Fed.Reg. 37,668 (1992). However, this non-enforcement policy did not preclude employees from suing. *Id.* (rights under 29 U.S.C. § 216(b) not affected).

Thereafter, in 1991 the Department adopted an interim final regulation which provided that public sector employees would not lose their FLSA exemption because they received leave without pay ("LWOP") for absences of less than one day. 56 Fed.Reg. 45,826 (1991). The Department also proposed a regulation which sought to restore exempt status to employees who in the past had received LWOP for absences of less than one day, and

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of the FLSA to state and local governments. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556-57 (1985).

who had been subsequently reimbursed for that leave. 56 Fed.Reg. 45,829 (1991).[5]

The interim final regulation was modified in 1992, and established that public sector employees would not lose their FLSA exemption because accumulated leave is reduced or LWOP used for absences of less than one day. 57 Fed.Reg. 37,677 (1992). In promulgating the 1992 regulation, the Department explained that public entities such as the County have pay systems which are based upon notions of public accountability, under which "governmental employees should not be paid for time not worked due to the need to be accountable to the taxpayers for the expenditure of public funds." 57 Fed.Reg. 37,667 (1992). "As a consequence, few public employers compensated employees in a manner that would satisfy the [salary basis test] required by the regulations." *Id.*

The Department admitted that it "first observed this anomaly" in 1985. *Id.* As the Department observed,

> "[i]n light of the public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended FLSA coverage to State and local governments [i.e., the salary basis test] simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees. *The regulations were thus out of harmony with the intent of the statute because State and local governments could not practically avail themselves of the exemption intended by Congress, and*

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[5] That proposed regulation was later withdrawn. 57 Fed.Reg. 37,678 (1992).

thus were inappropriate as applied in the public sector."

57 Fed.Reg. 37,672 (1992) (emphasis added).

REASONS FOR DENYING THE WRIT

I. There Are No Direct Conflicts With Decisions From Other Courts Of Appeals

Petitioners argue that the opinion of the Ninth Circuit conflicts with the express holdings of the Seventh and D.C. Circuits, as well as with implicit holdings of six circuit courts of appeals. They are mistaken.

1. The first case discussed by petitioners is *Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3297 (U.S. Oct. 10, 1995) (No. 95-586). In *Mueller*, engineers employed by the State of Wisconsin were subject to having pay docked in two circumstances: (1) for absences of less than one day; and (2) for disciplinary infractions that did not breach a major safety regulation. *Id.* at 440. The Seventh Circuit found that the Department's salary basis regulation, 29 C.F.R. § 541.118, as amended by 29 C.F.R. § 541.5d, was valid. *Id.* at 441-42. Because the salary basis regulation precluded the loss of less than a week's pay for disciplinary infractions that were not a breach of a major safety regulation, *see* 29 C.F.R. § 541.118(a)(5), the engineers won.

Although the Seventh Circuit decided *Mueller* more than six months after the Ninth Circuit initially ruled in

this case,[6] *Mueller* never mentioned the Ninth Circuit's decision. Nor did the *Mueller* court discuss the Ninth Circuit's rationale, which was grounded on the Department's "firm conviction that its earlier iteration of the salary test conflicted with congressional intent." Appendix to Petition ("App.") App. 12a-13a; 41a-42a. The Ninth Circuit's "firm conviction" statement was based upon the Department's explanation of its reasons for adopting 29 C.F.R. § 541.5d, which was quoted at length by the Ninth Circuit. *See* App. 12a; 40a-41a. For whatever reason, the *Mueller* court ignored this analysis. Thus, the Seventh Circuit never disapproved either the Ninth Circuit's holding or its reasoning, and accordingly there is no direct conflict between the decisions.

Even if some sort of conflict existed,[7] that conflict is not worthy of certiorari. Because *Mueller* never discussed nor recognized this alleged conflict, the Ninth Circuit's reasoning could still be adopted by a different Seventh Circuit panel. Alternatively, a future Seventh Circuit panel might at least explain why the Ninth Circuit's logic should not be followed, in which case a direct conflict would be established.

Moreover, the two cases concern different iterations of the salary basis regulation. The Ninth Circuit decision

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[6] The Ninth Circuit's original decision in this case was filed on October 5, 1994. *See* Appendix to Petition 30a.

[7] The State of Wisconsin argues that *Mueller* creates an indirect conflict with the Ninth Circuit. *See* Petition for Certiorari in *Mueller*, at 10. In *dicta*, the Eighth Circuit implies that a conflict exists between the two decisions. *See Auer v. Robbins*, 65 F.3d 702, 710 n.6 (8th Cir. 1995).

held that the salary basis regulation, "as it existed before the [Department] suspended its application to public employers on September 6, 1991," was entirely invalid. App. 13a. On the other hand, *Mueller* held that the salary basis regulation, "as amended by 29 C.F.R. § 541.5d," was valid. *Mueller*, 54 F.3d at 441-42. The amendment to the salary basis test referred to in *Mueller* occurred on August 19, 1992. *See* 57 Fed.Reg. 37,666 (1992). In other words, the decisions concern different regulations, one which is pre-September 6, 1991, and the second which is post-August 19, 1992. The cases are thus factually dissimilar, which in turn renders any conflict distinguishable.

2. Additionally, *Kinney v. District of Columbia*, 994 F.2d 6 (D.C.Cir. 1993), does not conflict with the Ninth Circuit's decision. *Kinney* refused to consider the argument that the salary basis test did not apply to the public sector because that argument was not made before the trial court. *Id.* at 10. Its discussion of the Department's statements was limited to whether such statements were an intervening change in the law, which would permit the court to entertain a new argument on appeal. *Id.* The court found that such statements were not an intervening change in the law. *Id.* Thus, at best the section of *Kinney* relied upon by petitioners is *dicta*.

3. Finally, none of the remaining cases and circuits cited by petitioners at pages eight and nine of their Petition are in conflict with the Ninth Circuit's decision. As petitioners note, those cases "applied" the salary basis test which the Ninth Circuit held invalid. However, the issue of the invalidity of the salary basis test was never

raised in those cases.[8] It therefore cannot be said that those cases "implicitly" held that the salary basis test was valid, since that precise issue was not before any of the courts.

II. The Question Of Federal Law Decided By The Ninth Circuit Need Not Be Settled By This Court

Petitioners argue that this Court should step in and settle the question of the applicability of the salary basis test to public employers. What they ignore is the duties test requirement for exemption from the FLSA. *See* discussion *supra* and n.2. The requirement that exempt positions have duties that fall within the administrative, professional, and executive exemptions ensures that the underlying goals of the FLSA are being met, and that only persons in such bona fide capacities are being exempted. *See* 29 U.S.C. § 213(a)(1).

In addition, petitioners do not merit the intervention of this Court. They fail to state the obvious: that they are white-collar workers seeking to take advantage of a perceived loophole in the system. They are already receiving either compensatory time off or straight-time overtime pay for extra hours worked. *See* App. 70a.

The Ninth Circuit decision should be permitted to be addressed on the merits by other circuits, which will either adopt or reject its reasoning. If another circuit court rejects the Ninth Circuit's reasoning, then a true conflict of decisions between the circuits will arise which might

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[8] With the exception of *Kinney*, which as noted above refused to consider the issue.

justify certiorari. However, at this moment, no true conflict exists, and nothing compels this Court's intervention at this time.

III. The Ninth Circuit's Decision Is Consistent With Decisions Of This Court

Petitioners' final argument asserts that the Ninth Circuit's decision conflicts with this Court's prior decisions in four different respects. Petitioners are wrong.

1. Petitioners initially argue that the Ninth Circuit's decision contravened this Court's decision in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Reviewing the Ninth Circuit's reference to the FLSA's legislative history, petitioners assert that the salary basis test does not conflict with Congress's unambiguous intent. Petition at 14.

In making this argument, petitioners describe *Chevron U.S.A.* as holding that courts should not invalidate legislative regulations unless they conflict with the unambiguous intent of Congress. *Id.* at 11. This misstates the test enunciated in *Chevron U.S.A. Chevron U.S.A.*'s analysis is instead two-fold: (1) if Congressional intent is clear, the court must give effect to this clear "unambiguously expressed intent of Congress," 467 U.S. at 843; and (2) if Congress's intent is not clear, then the court must determine if the agency's construction of the statute is "permissible." *Id.* Put another way, courts must "reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9.

The Ninth Circuit followed this analysis. As it noted, Congress clearly intended that the executive and administrative exemptions should apply to the public sector. App. 8a; 21a (quoting from the Department's brief). What petitioners dispute, however, is the Ninth Circuit's logic, which reasoned that having intended an exemption to apply, Congress must also have intended that the salary basis test could not defeat that exemption. Yet this logic is merely an extension of the clear congressional intent: Congress could not have meant to grant public employers an exemption, only to preclude the use of that exemption by the salary basis test. Doing so would lead to an absurd result, which should be avoided. *See United States v. Turkette*, 452 U.S. 576, 589 (1981).

The Ninth Circuit's logic was not flawed. The Ninth Circuit found, as did the Department, that public accountability principles rendered impossible the use of those exemptions by public employers. App. 13a (quoting the Department's explanation for promulgation of 29 C.F.R. § 541.5d). Public employers were thus caught in a classic "Catch-22." On the one hand, Congress intended public entities to exempt certain employees from the FLSA. On the other hand, the salary basis regulation adopted by the Department made it impossible for public entities to take advantage of the exemptions.

Petitioners seek to illustrate their argument by reference to the Court's own judicial clerks. What they fail to note is that this Court's law clerks are not subject to the federal government's competitive service requirements, and that the FLSA only applies to units of the federal judiciary that are subject to competitive service. *See* 29 U.S.C. § 203(e)(2)(A)(iii) (persons employed in such units

are not "employees" within the meaning of the FLSA). Additionally, exempt status for federal employees is not contingent upon meeting the salary basis test. *See* 57 Fed.Reg. 37,667 (1992) (exempt status under Office of Personnel Management regulations does not include a salary basis requirement).

In short, the salary basis test is strictly an invention of the Department, and there is nothing talismanic about it. The Ninth Circuit's decision does not conflict with *Chevron U.S.A.*[9]

2. Petitioners' next two arguments relate to extensions and amendments to a statute when an agency has a longstanding interpretation of the statute, or when the agency's interpretation has been brought to the attention of the public and Congress with no attendant change by Congress. Petition at 18-20. Under these circumstances, petitioners claim that Congress intended that the salary basis test apply to the public sector.

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[9] Petitioners also argue that *Chevron U.S.A.* has been violated in other instances. However, a close reading of those subsidiary arguments (found at Petition 14-18) discloses that petitioners do not argue that there is an actual conflict with *Chevron U.S.A.* Thus, petitioners' section III(1)(b) argument is actually directed to public policy considerations. Petitioners' section III(1)(c) argument questions the failure of the Ninth Circuit to give deference to the Department's interpretation. Yet that argument does not conflict with *Chevron U.S.A.*, which sets forth circumstances in which an agency's interpretation will not be followed. These arguments thus assert error because of an alleged "misapplication of a properly stated rule of law," for which certiorari is rarely granted. *See* Sup. Ct. R. 10.

However, as this Court has recently stated, "congressional silence 'lacks persuasive significance,' particularly where administrative regulations are inconsistent with the controlling statute . . . ." *Brown v. Gardner*, 513 U.S. ___, 115 S.Ct. 552, 557 (1994) (citations omitted). Moreover, "[i]t is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation." *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (citation omitted). This is because "[c]ongressional inaction frequently betokens unawareness, preoccupation, or paralysis." *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969). Congress's inaction is persuasive evidence of nothing.

3. Petitioners finally claim that the Ninth Circuit impermissibly acted in an area reserved for the executive branch. This is an argument more appropriately reserved for a merits brief, and does not fall within the considerations set by this Court for granting certiorari.

CONCLUSION

For all of these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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